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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79- 6704

ORIGINAL COPY

JOHNNY MACK WESTBROOK,

Petitioner,

v.

CHARLES BALKCOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Is the imposition of Petitioner's death penalty constitutional?

Did Petitioner receive effective assistance of counsel during the sentencing phase of the trial?

STATEMENT OF THE CASE

The material facts of Petitioner Johnny Mack Westbrook's case are undisputed. On September 23, 1977, Petitioner and Eddie Finney went to the home of Mrs. Thelma Kalish at 1183 Jackson Springs Road in Macon, Georgia (T. 219, 259).[1/] Under the pretext of needing gasoline to cut her lawn, Finney lured Mrs. Kalish outside her home. (T. 219). Petitioner grabbed her, stuck a pistol in her side, and took her back into her home. (T. 219, 259). There they tied up Mrs. Kalish, and both Petitioner and Finney raped her. (T. 219, 222, 259, 302).

Mrs. Kalish did not have any cash at home, so they took her to Macon Federal Savings Bank and forced her to withdraw $600 in cash. (T. 196-98, 223, 261, 264). They returned to her home, but when they arrived, Mrs. Kalish jumped out of the car and began running. (T. 223-24, 261). Petitioner caught her and hit her over the head with his pistol. (T. 224). When a neighbor, Mrs. Ann Kaplan, heard the noise and came outside, Finney grabbed Mrs. Kaplan and hit her with his fists and a pistol. (T. 224, 262, 265-66).

Petitioner and Finney put the two women in the back seat of Mrs. Kalish's car and drove to a wooded area in Jones County, Georgia (T. 224, 262). There they took the women into the woods and tied and gagged them. (T. 225, 262). In order to eliminate witnesses to their rape and robbery, Petitioner and

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1/ T. refers to the trial transcript.

Finney beat the two women to death with a two-by-four piece of lumber. (T. 225-26, 262-63). Petitioner murdered Mrs. Kaplan and Finney murdered Mrs. Kalish. (T. 226, 263). An autopsy revealed that Mrs. Kaplan died of torn lacerations in the heart. (T. 300-01). Mrs. Kaplan also had bruises on her upper trunk, shoulders and chest; and Mrs. Kalish had a three-inch laceration in her forehead, a fractured jaw, a fractured rib, a fractured arm, and several broken teeth. (T. 298-99, 301-02, 304).

Petitioner and Finney returned to Macon and abandoned Mrs. Kalish's car at the Fifth Street Bridge. (T. 226, 263). Petitioner went back to his apartment where he left Mrs. Kaplan's jewelry and his pistol. (T. 226).

That night Petitioner and Finney took a cab to Jackson Springs Road; however, when they saw several police cars, Petitioner directed the cab driver back to the place where the driver picked them up. (T. 188-190). When Petitioner paid the bill, the driver noticed that Petitioner had a large roll of bills which were still in the band from the bank. (T. 191-92).

Through an informer, police identified Petitioner and Finney as the felons, and Deputy Gerald Butterworth placed Petitioner under arrest. (T. 208-09). When he was arrested, Petitioner had $500 in $20-bills in his right sock. (T. 209-10). A search of Petitioner's apartment revealed a .32 pistol and loaded clip under the mattress and Mrs. Kaplan's charm bracelet on top of the vanity. (T. 311-12, 314).

After Finney was arrested, he took law enforcement officers to Jones County where they found the bodies and Mrs. Kalish's purse. (T. 202-03). Inside the purse was a savings withdrawal slip for $600, dated September 23, 1977. (T. 280).

Finney's fingerprints were found on drinking glasses in Mrs. Kalish's bedroom, and both Petitioner and Finney confessed to the crimes. (T. 221, 276, 341-42).

Petitioner was indicted by a Jones County grand jury for two counts of murder and two counts of kidnapping with bodily injury. (R. 11-12).[2/] He was tried in the Jones County Superior Court November 7-9, 1977; and the jury found him guilty of all four charges. (R. 12, Transcript Cover Page).

The jury found that the murders of Mrs. Kaplan and Mrs. Kalish were outrageously or wantonly vile, horrible or inhuman in that they involved torture, depravity of mind or an aggravated battery to the victims. (R. 57, 59). The jury also found that the murder of Mrs. Kaplan was committed while Petitioner was murdering Mrs. Kalish. (R. 57). The jury recommended the death penalty for both murders (R. 57, 59-61), and Petitioner received two life sentences for the kidnappings. (R. 62-63).

2/ R. refers to the record of the pleadings in the Superior Court of Jones County, Georgia.

Petitioner's conviction and sentence were affirmed on direct appeal. Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), cert. denied, 439 U.S. 1102 (1979). He had a habeas corpus hearing in the Superior Court of Tattnall County, Georgia, which dismissed the petition; and the Georgia Supreme Court denied a certificate of probable cause to appeal.

REASONS FOR NOT GRANTING THE WRIT

A. THE IMPOSITION OF PETITIONER'S DEATH PENALTY IS CONSTITUTIONAL.

In Godfrey v. Georgia, ___ U.S. ___, 27 Crim.L.Rptr. 3109 (1980), this Court vacated a death penalty imposed for the shotgun slaying of two persons. Both victims died instantly and there was no tortune or physical injury prior to death. Id. at 3117, 3119. The only statutory aggravating circumstance was Ga. Code Ann. § 27-2534.1(b)(7), i.e., "the offense of murder was outrageously or wantonly vile, horrible and inhuman." Id., at 3117.

In Petitioner's case Mrs. Kalish was raped prior to being murdered and both women were beaten to death with boards. Therefore, Petitioner's case is factually distinguishable from Godfrey. Moreover, the jury found another aggravating circumstance. The murder of Mrs. Kaplan occurred during the course of another capital felony, the murder of Mrs. Kalish. See

Ga. Code Ann. § 27-2534.1(b)(2). Where there is a valid aggravating circumstance to support the imposition of the death penalty, the vacating of a second aggravating circumstance leaves undisturbed the death penalty. See, Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), cert. denied, 429 U.S. 986 (1976); Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92 (1978), cert. denied, 439 U.S. 991 (1978).

B. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF THE TRIAL.

Petitioner's attorney was faced with an extremely difficult task. It was undisputed Petitioner and Finney had kidnapped, and brutally murdered two elderly women.

During the guilt-innocence phase of the trial, Petitioner had been convicted of two counts of murder and two counts of kidnapping. His attorney attempted to get sympathy for the Petitioner by showing that in 1951 at age 14, Petitioner, a black, had without counsel pled guilty to a number of burglary charges and received 85 years imprisonment. Since the age of 14, Petitioner had spent all but 3 years of his life in prison. However, Petitioner was not able to remember when he went to prison or when he got out, and his attorney believed Petitioner's correctional file was the most dramatic way to show what had happened to Petitioner during his adult life.

There were six blacks on the petit jury, and Petitioner's attorney hoped to inflame them against a judicial system that treated a 14-year-old black the way Petitioner had been treated. The attorney wanted to show that by its inhuman treatment of Petitioner, the State had forfeited its right to execute him. The attorney hoped that some of the persons on the jury would hold out for life imprisonment.

The Sixth Amendment requires not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961); Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977).

Ineffective assistance of counsel is not established merely because in retrospect another attorney would have handled the case differently. United States v. Rodriguez, 498 F.2d 302, 309-10 (5th Cir. 1974). Petitioner's attorney made a reasonable tactical discussion in a very difficult case, and Petitioner was not deprived of effective assistance of counsel during the sentencing phase of the trial.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by the Petitioner.

Respectfully submitted,

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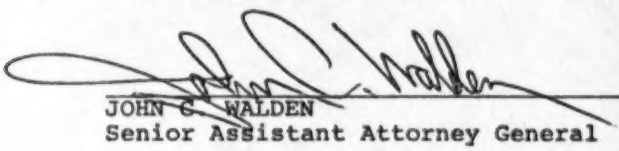

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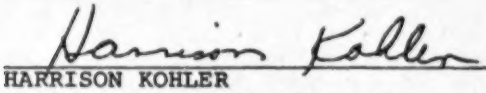

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